IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:21.11.2007

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

Writ Petition No.19589 of 2006

Kaliappan ... Petitioner

Vs.
1.The State of Tamil Nadu, rep.
by Secretary to Government,
Hindu Religious and Charitable
Endowments Department,
Fort St.George,
Madras-9.

2.The Commissioner,
H.R.& C.E.Department,
Madras-34. ... Respondents

This petition came to be numbered by transfer of O.A.No.1227 of 1994 on the file of the Tamil Nadu State Administrative Tribunal praying for the issuance of a Writ of Certiorarified Mandamus to call for the records relating to the proceedings of the 2nd respondent in D.Dis.No.82199/89/L1 dated 30.10.1989 and the order passed by the first respondent in Letter No.3391/N2/92-13 dated 11.9.1992, quash the same and direct the respondents to refix the pay of the petitioner in the cadre of Executive Officer Grade-I with effect from 2.2.1969 on which date his immediate junior was promoted as Executive Officer Grade-I and to pay arrears of the petitioner's salary on the basis from 29.3.1976, the date of his appointment of Executive Officer Grade I and also grant all other consequential benefits such as pension etc.
For petitioner : Mr.V.Selvaraj & Jayasingh
For respondents : Mr.M.R.Murugesan
Spl.Govt.Pleader HR & CE
O R D E R
The petitioner has challenged the order dated 30.10.1989 of the Commissioner Hindu Religious and Charitable Endowment Department, Chennai and the order dated 11.9.1992 of the Secretary to Government, Commercial Taxes & Hindu Religious Endowments Department, Chennai and sought for a direction to the respondents to re-fix his pay on par with that of his immediate junior one Mr.Lingamaraja, in the cadre of Executive officer, Grade-I and claimed payment of arrears of salary from the date of his actual promotion in the said post.
2.Brief facts leading to this writ petition are as follows:
The petitioner was appointed as an Executive Officer Grade-II on 7.7.1962. The Government directed the Executive Officers appointed by the Commissioner in the year 1962 to appear before the Tamil Nadu Public Service Commissioner in the year 1965. There was a controversy as to whether the petitioner was entitled to be regularised from the date of his first appointment or from the date of announcement of selection by the Tamilnadu Public Service Commission. One of the Executive Officers similarly placed like the petitioner filed W.P.No.2401/70 seeking regularisation of service from the date of the first appointment. Based on the orders in the above writ petition, the

Government regularised the services of all the Executive Officers appointed by the Commissioner from the date of their initial appointment as per G.O.Ms.No.1206, Revenue Department dated 24.4.1970 and consequently the services of the petitioner was regularised with effect from 7.7.1962 i.e. from the date of his initial appointment. It is further submitted that there was a long delay on the part of the Department in fixing the inter-se seniority for the period between 1962 to 1965 among the direct recruitment and the promotees to Grade II Executive Officers and the same came to be settled by the Commissioner H.R. & C.E., Chennai, the second respondent in his proceedings dated 29.11.1979. In the meantime, many of the petitioner's juniors were promoted as Grade II Executive Officers between 1962 to 1965. Though the petitioner was fully qualified for promotion in the year 1969, he was promoted as Executive Officer Grade I on 29.3.1976 only. The petitioner has further submitted that since the seniority list was not properly prepared and published, he was constrained to file a writ petition W.P.No.2239 of 1984 for fixation of seniority among Grade-I Executive Officers. As per the direction of this Court, the seniority among Executive Officers Grade-I was fixed and published by the proceedings of the Commissioner dated 27.10.1984 and it was also approved by the Secretary to the Government, Hindu Religious and Charitable Endowment Department, Chennai, the first respondent herein. Aggrieved by the revision of seniority, Thiru Lingamaraja, filed writ petition challenging the seniority list drawn by the Commissioner, H.R. & C.E. Department, Chennai and the same was dismissed.

3.When there was a delay in finalisation of seniority list of Grade-I, Executive Officers, the said Lingamaraja was promoted as Executive Officer Grade-I on 2.2.1969, whereas, the petitioner, who was eligible for promotion to the said post, was promoted only on 29.3.1976. It is further submitted that when promotions were made on the basis of the defunct seniority list, the same were challenged in this court in W.P.Nos.1407 of 1985, 3238 of 1985 and 4575 of 1985 and the writ petitions were allowed. As a result, persons who had been promoted from the old list were reverted and the seniority list was revised and published as per proceedings of the Commissioner dated 17.10.1984. The petitioner was promoted as Assistant Commissioner. As the petitioner's junior was drawing an higher pay scale in the post of Executive Officer Grade-I, the petitioner submitted a representation dated 30.9.1989 to the Commissioner, H.R. and C.E., Administration Department, Chennai, the second respondent herein. The petitioner received a reply from the Commissioner dated 30.10.1989, stating that the Government and Mr.Lingamaraja have preferred W.A.No.84 of 1986, W.A.No.82 of 1986 and W.A.No.876 of 1985 and since the appeals were pending, the petitioner' pay cannot be re-fixed on par with that of his junior and only after disposal of the appeals, fixation of seniority would be taken up and settled duly applying the amended Rules 35(aa) and the proviso thereto and the petitioner was informed that as per Rule 35(aa) of the Tamil Nadu State Subordinate Officers Service Rules, the benefit of the first proviso (i.e. appointment on par with that of his junior and restoration of seniority in lower grade) shall be available to the senior, only for the purpose of fixing the inter-se seniority. In view of the above provision, the claim of fixation of pay on par with that of his junior does not arise. Aggrieved by the above said order dated 30.10.1989, the petitioner preferred an appeal to the first respondent to fix his pay on par with that of his immediate junior Thiru.Lingamaraja in the post of Executive Officer Grade-I. The Government by the impugned order 11.9.1992 rejected the claim of the petitioner and the same was challenged before the Tamil Nadu State Administrative Tribunal for the relief as stated supra.
4.The respondents in their counter affidavit have submitted that originally the petitioner was appointed as an Executive Officer Grade-II on temporary basis along with 14 others by the Commissioner, H.R.& C.E., Department, Chennai and he joined duty on 7.7.1962. Since the above incumbents were appointed directly to the post of Grade-II Executive Officers, they were directed to apply to the Tamil Nadu Public Service Commission for the appointment of Grade-II Executive Officer on regular basis. The petitioner and others applied for regular appointment as Grade-II Executive Officers in the year 1965 and the petitioner obtained second rank. Based on the list submitted by the Tamil Nadu Public Service Commission, inter-se-seniority of Grade II Executive

Officers was fixed by the Commissioner, H.R. & C.E., Department, Chennai by his order dated 29.11.1979 by applying Rule 35(aa) of Tamil Nadu State and Subordinate Services Rules and Rule 2(b) of Hindu Religious and Charitable Endowments Subordinate Service Rules, Thiru Lingamaraja was placed at Sl.No.3.

5.It is further submitted that prior to the above said inter-se-seniority list in the category of Executive Officers Grade-II, the petitioner was promoted to the category of Grade-I Executive Officer on 30.3.1976, whereas, Thiru. Lingamaraja was promoted as Grade-I Executive Officer as early as on 2.2.1969. Hence, the inter-se-seniority of Grade-I Executive officers was to be revised and accordingly orders were issued by the Commissioner, H.R. & C.E. Department, Chennai, the second respondent herein on 27.10.1984, fixing the inter-se-seniority of Grade-I Executive Officers, who were appointed by Direct recruitment, promotion and by recruitment by transfer as per the provisions contained in Rule 35(aa) of Tamilnadu State and Subordinate Services Rules read with Rule 2(b) of the Hindu Religious and Charitable Endowments Subordinate Service Rules and subsequently, the petitioner was placed at Sl.No.8 and Lingamaraja was placed at Sl.No.9. The respondents further submitted that fixation of seniority could not be made in view of the pendency of the appeals and therefore, the second respondent by his order dated 30.10.1989, informed the petitioner that only after the disposal of the appeals, fixation of seniority would be considered by applying the amended Rules 35(aa) of Tamil Nadu State Subordinate Services Rules and the provisio thereto.

6.The respondents have further submitted that the said Lingamaraja, whom the petitioner has referred to as his junior, is not actually his junior, but he was a promotee from Grade-III category of Executive Officer. He joined as Grade-II Executive Officer on 2.2.1962 prior to the petitioner's posting as Executive Officer Grade-II. Whereas, the petitioner was appointed as Grade-II Executive Officer on temporary basis only on 7.7.1962 and subsequently he was appointed on regular basis. The respondents have further submitted that the request of the petitioner to fix pay scale on par with that of his junior cannot be fixed as per Rule 35(aa) of the Tamil Nadu State Subordinate Services Rules, as the proviso shall be made applicable to the senior, only for the purpose of fixing inter-se-seniority and not for the purpose of re-fixing of pay.

7.Learned counsel appearing for the petitioner submitted that once the seniority list in the post of Executive Officer Grade-II is revised and the petitioner is placed above Lingamaraja, he is deemed to have been promoted as Grade-II Executive Officer even on 2.2.1969 itself, i.e. the date on which his immediate junior Lingamaraja was promoted to the post of Grade-I Executive Officer. He further submitted that due to the delay and mistake committed by the department in fixing the seniority in the post of Executive Officer Grade-I, the promotional chance of the petitioner was delayed and therefore the pay of the petitioner ought to have been fixed in the cadre of Executive Officer Grade-I as on 2.2.1969 and notional increments ought to have been allowed and that the petitioner is also entitled to arrears of salary, which he would have drawn on the higher fixation of pay from 29.3.1976 onwards, i.e. the date when he assumed office in the post of Executive Officer Grade-I. He further submitted that though the petitioner had lost his opportunity to serve as Executive Officer Grade-I due to the mistake committed by the respondents, but he is entitled to have his pay fixed as Executive Officer Grade -I as on 2.2.1969 and the denial of fixation of pay and arrears of salary from 1976 is violative of Article 14 of the Constitution of India.

8.On the other hand, learned Government Advocate referring Rule 35(aa) of the Tamil Nadu State Subordinate Services Rules submitted that the benefit of the proviso to Rule 35(aa) is available to the senior, only for the purpose of fixing the inter-se-seniority and not for re-fixing of pay and therefore, she submitted that the pay of the petitioner cannot be fixed on par with that of his junior in the category of Grade-II Executive Officer with effect from 2.2.1969 as claimed by the petitioner.

9.The point for consideration is whether the petitioner, who had been overlooked for promotion to the next higher post after restoration of his original seniority on appeal, is entitled to re-fixation of

pay on par with that of his junior and whether he is entitled to arrears of salary in the promotional post. Though the petitioner was appointed as Executive Officer Grade-II, since the post falls within the purview of the Tamil Nadu Public Service Commission, those who have been appointed along with the petitioner as Grade-II Executive Officers were directed to undergo the examination conducted by the Public Service Commission in the year 1965. From the pleadings it is evident that before the government issued orders in G.O.Ms.No.1206, Revenue Department dated 20.4.1970, regularising the service of the petitioner, from 1962 onwards, Mr.Lingamaraja, by fortuitous circumstances, was promoted as Executive Officer Grade-I on 2.2.1969. But, the petitioner was promoted as Executive Officer Grade-I only on 30.3.1976. In view of the dispute in determining the inter-se-seniority among the Executive Officers, who were appointed during 1962 to 1965 i.e. directly recruited by transfer and the promotees and due to various litigations, the promotion chance of the petitioner was delayed and ultimately, he was promoted to the post of Grade-I Executive Officer in the year, 1976 only.

10.Later on, when the inter-se-seniority list among the Grade-II Executive Officer was revised by the proceedings of the Commissioner dated 29.11.1979, the petitioner was placed above in the seniority list. Similarly, when the conflict between the Grade-I Executive Officers appointed by direct recruitment, by promotion and by recruitment by transfer, was finally resolved by the Commissioner in his proceedings dated 27.10.1984, the petitioner was placed at serial No.8 and the said Lingamaraja was placed at Serial No.9. It is further evident from the admission in the reply affidavit at paragraph 10 that prior to the issuance of the inter-se-seniority list in the category of Grade II, the Mr.Lingamaraja joined as Executive Officer Grade-I on 2.2.1969, whereas the petitioner was promoted to the category of Grade-I Executive Officer on 30.3.1976 and after revision of seniority as per the provisions contained in Rule 35(aa) of the Tamil Nadu State Subordinate Services Rules and Rule 2(b) of the H.R. & C.E. Subordinate Service Rules, the petitioner was placed at 8th position above his junior and even in the seniority list published in the year 1984, the petitioner was placed at Serial No.4 and the said Lingamaraja was placed at Serial No.5." The respondents in their reply affidavit had categorically admitted that consequent to the revision of seniority, the petitioner was shown as senior than the said Lingamaraja. The only ground on which the respondents have denied re-fixation of pay in the post of Executive Officer Grade-II is that the proviso to the Rule 35 (aa) available to the senior, is only for the purpose of fixing the inter-se-seniority and not for fixing the pay. Rule 35(aa) of the Tamilnadu State Subordinate Services Rules is extracted here under:

"35(aa) The seniority of a person in service, class or category to grade shall unless he has been reduced to a lower rank as a punishment be determined by the rank obtained by him in the list of approved candidates drawn up by the Tamil Nadu Public Service Commission or other Appointing Authority, as case may be, subject to the rule of reservation where it applies. The date of commencement of his probation shall be the date on which he joins duty irrespective of his seniority."

11.It is apparent from the impugned order that the respondents have erroneously applied Rule 35(aa) and its proviso of Tamil Nadu State Subordinate Service Rules for rejecting the claim of the petitioner in fixing the pay on par with that of his junior. There cannot be any dispute that Rule 35(aa) can be applicable only for fixing the seniority and there is no relevant provision in the Tamilnadu State and Subordinate Services Rules for fixation of pay. When the seniority was settled in the category of Executive Officer Grade-II in the year 1979 and Grade-I in 1984, the respondents ought to have addressed the question as to whether the promotion of the petitioner to the post of Executive Officer Grade-I was delayed due to the pendency of the issue of revision of seniority on account of litigations pending before the court.

12.It is the admitted case of the respondent that consequent to the revision of seniority as per Rule 35(aa) of the Tamil Nadu State and Subordinate Services Rules, the petitioner was placed above his junior Mr.Lingamaraja in the category of Executive Officer Grade-I. In case where a government servant has been overlooked for promotion/appointment to a higher post, but subsequently

promoted/appointed to that post and his seniority is restored, his pay shall be fixed on the date of assumption of the charge in the higher post on par with that of his junior, provided he had drawn the same scale of pay as his junior in the lower post from time to time. No material has been produced by the respondent to show that the petitioner and his junior were getting different scale of pay in the lower post i.e. Executive Officer Grade-II. Therefore the petitioner is entitled to have his pay fixed in the cadre of Executive Officer Grade-I, with effect from 2.2.1969, the date on which his junior was promoted as Executive Officer. However, taking into consideration of the date of joining as Executive Officer Grade-I, i.e. 29.3.1976, the petitioner is entitled to the arrears of salary and other consequential benefits, only from that date onwards. In view of the above, the orders impugned in this writ petition are set aside and consequently, the respondents are directed to refix the pay of the petitioner in the cadre of Executive Officer Grade-I

S.MANIKUMAR,J.

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with effect from 2.2.1969 on which date his immediate junior was promoted as Executive Officer Grade-I and to pay arrears of the petitioner's salary with effect from 29.3.1976, the date of his appointment of Executive Officer Grade I and grant all other consequential benefits such as pension etc. The respondents are directed to complete the exercise within a period of twelve weeks from the date of receipt of the copy of this order. Accordingly the writ petition is allowed. No costs.

21.11.2007

Index:Yes

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by Secretary to Government,
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